



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JANUARY 24, 2023

IN THE MATTER OF:

Appeal Board No. 626256

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination, holding the claimant ineligible to receive benefits, effective August 1, 2022, through November 27, 2022, due to receipt of dismissal pay.. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which testimony was taken. There was an appearance by the claimant. By decision filed October 14, 2022 (), the Administrative Law Judge modified the initial determination, to be effective August 1, 2022, through October 23, 2022, and, as so modified, sustained the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board insofar as the initial determination was modified and sustained. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Our review of the record reveals that the case should be remanded to hold a further hearing. Labor Law § 591(6)(c) provides that the "amount of dismissal

pay shall be allocated based on the claimant's actual weekly remuneration paid by the employer during his or her employment or, if such amount cannot be determined, the amount of the claimant's average weekly wage for the highest calendar quarter (emphasis added)." As the claimant's base salary included random commissions and bonus payments, his actual weekly remuneration could not be determined. Therefore, the claimant's weekly wage should be calculated based upon his average weekly wage for the highest calendar quarter in his

base period, as reported to the Department of Labor. (See Appeal Board Nos. 589557, and 589460). As a result, the parties will have an opportunity to submit testimony and other evidence on this issue.

At the further hearing, the Commissioner of Labor should appear and introduce evidence regarding the claimant's wages in his basic and alternate base periods. Any documentary evidence in support of such calculations shall be produced at hearing for entrance into the record after an opportunity for objection and comment.

The parties should be confronted with the claimant's application information screen, LO801, pages 31-34, in its entirety, previously marked in part, page 31, as Hearing Exhibit 1, as well as the claimant's earnings statements from December 31, 2018, December 31, 2019, and December 31, 2020, previously marked as Hearing Exhibit 5, and afforded the opportunity for objection and comment thereon prior to entrance of such documentation into the record.

Now, based on all of the foregoing, it is

ORDERED, that the decision of the Administrative Law Judge be, and the same hereby is, rescinded; and it is further

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue, upon due notice to all parties and their representatives; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and, so that at the end of the hearing, all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the issue, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

JUNE F. O'NEILL, MEMBER